Nos. 04-1528, 04-1530 and 04-1697

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IN THE

Supreme Court of the United States

NEIL RANDALL, *et al.*,

Petitioners,

v.

WILLIAM H. SORRELL, *et al.*,

Respondents.

VERMONT REPUBLICAN STATE COMMITTEE, *et al.*,

Petitioners,

v.

WILLIAM H. SORRELL, *et al.*,

Respondents.

WILLIAM H. SORRELL, *et al.*,

Cross-Petitioners,

v.

NEIL RANDALL, *et al.*,

Cross-Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICI CURIAE* OF CURRENT AND FORMER STATE COURT JUSTICES AND JUDGES IN SUPPORT OF WILLIAM H. SORRELL, *et al.*

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With the consent of the parties, *Amici Curiae* hereby submit their brief in support of William Sorrell, *et al.*, Respondents/Cross Petitioners in these cases.[1]

INTERESTS OF THE *AMICI CURIAE*

Amici Curiae are current and former state court justices and judges, who are deeply concerned about the growing influence of special interest money on judicial campaigns.[2] Most of the *Amici* have personal experience as candidates in judicial elections, and all of them deplore the disturbing trends increasingly coming to national attention. *Amici* do not necessarily support spending limits in any particular campaigns, but they believe that sovereign states should have the power to protect their elected judiciaries from the corrosive effects of uncontrolled spending by imposing generous limits on expenditures by candidates for the bench. *Amici* recognize that the instant case does not pertain directly to judicial campaigns, but a ruling that *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), constitutes an absolute bar to mandatory spending limits will directly impair their interests in protecting the integrity, impartiality, and independence of the bench, both real and perceived. *Amici* therefore urge this Court not to accept that excessively expansive reading of *Buckley*, or, if that reading cannot be avoided, to revisit *Buckley*'s ruling in light of the arguments presented here.

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[1] We have been informed that the Attorney General of Vermont has filed a letter with the Clerk of this Court, consenting to the filing of all *amicus* briefs. Letters from counsel for all other parties, consenting specifically to the filing of this brief, have been filed with the Clerk of this Court by counsel for *Amici*. No party's counsel authored any part of this brief. No person or entity other than *Amici* and their counsel contributed monetarily to preparing or submitting the brief.

[2] A complete list of the *Amici Curiae* is annexed as an Appendix to this brief.

SUMMARY OF ARGUMENT

Amici acknowledge that several courts have read language in *Buckley* to outlaw all campaign expenditure ceilings. *See Kruse v. City of Cincinnati*, 142 F.3d 907, 913-18 (6th Cir. 1998) (rejecting spending limits because interests advanced in their defense were rejected as constitutionally insufficient in *Buckley*). It is neither necessary nor appropriate, however, to read *Buckley* as an absolute ban on all mandatory limits on campaign spending. It is a mistake to read the language of any judicial opinion—including that of *Buckley*—as a theoretical pronouncement divorced from the fact pattern and statutory scheme that was actually before the Court.

Because the Federal Election Campaign Act ("FECA") at issue in *Buckley* imposed very low expenditure ceilings, and the *Buckley* Court evaluated only three state interests offered to justify those caps, this Court should not read *Buckley* to impose a *per se* ban on spending limits. Specifically, because FECA governs only federal candidates, *Buckley* did not present the issue whether expenditure caps applicable to judicial candidates might be justified by interests unique to the judiciary. This Court thus should not read *Buckley* to foreclose generous spending limits in campaigns for the bench. Point I.

If this Court concludes that *Buckley* categorically precludes all spending limits, then *Buckley* should be revisited. The decision in *Buckley* rests on the questionable premises that limits on spending invariably impose a severe burden on campaign speech and that contribution limits are adequate to combat real and perceived corruption. But above generous levels allowing for vigorous debate of the issues, the declining marginal utility of campaign spending means that each new dollar adds little new communicative value. Moreover, there is reason—including evidence from recent

judicial elections—to conclude that candidates are not eager to spend without limit but are instead trapped in a form of prisoner's dilemma that only generous spending limits can resolve. Without those limits, candidates must endlessly escalate the fundraising arms race, even if it means accepting contributions that taint their integrity and present opportunities for abuse. *Buckley* falls when these false premises are rejected. Point II(A)-(B).

Even if this Court does not reject *Buckley*'s tenuous assumptions, the opinion in these consolidated cases should be crafted with restraint. This Court should not permit its opinion to foreclose spending limits in judicial elections, which are not at issue in this case and the constitutionality of which has never been briefed to this Court. Whether such limits can be factually supported and legally justified is a question for another day. Point II(C).

ARGUMENT

I. *Buckley* Should Not Be Read To Ban Generous Spending Limits in Judicial Campaigns.

A judicial opinion is not a statute enacted to address broad and widely shared policy concerns. A court's opinion is a reasoned explanation for the resolution of a particular case or controversy. When explanatory language in an opinion appears to describe a rule far broader than necessary to resolve the particular case before the Court, the language is entitled to respect as the Court's considered *dictum*, but it is not controlling in different factual and legal settings. *E.g.*, *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 379 (1994) ("It is to the holdings of our cases, rather than their dicta, that we must attend."); *Kastigar v. United States*, 406 U.S. 441, 454-55 (1972) ("[B]road language" that is unnecessary to a decision "cannot be considered binding authority."); *Humphrey's Ex'r v. United States*, 295 U.S.

602, 627 (1935) ("[G]eneral expressions" in an opinion that "go beyond the case" may be respected "but ought not to control the judgment in a subsequent suit, when the very point is presented for decision.") (internal quotations omitted).

Because the broad language of *Buckley* goes well beyond what was necessary to decide the challenge to expenditure limits in that case, the opinion should not be read as binding on the very different circumstances presented in the cases now before this Court or a case challenging spending caps in judicial elections. Given the very low spending limits imposed by FECA, and the limited arguments in their defense asserted by the government, the federal expenditure caps could not withstand First Amendment scrutiny. But the ruling in *Buckley* does not foreclose the constitutionality of more generous spending limits supported by stronger justifications.[3]

A. *Buckley* Addressed Only the Very Low Spending Limits Imposed by FECA.

This Court first drew a bright-line distinction between campaign contributions and expenditures when it considered the constitutionality of the FECA 30 years ago in *Buckley*. The *Buckley* Court upheld FECA's caps on contributions to candidates, concluding that limiting large contributions

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[3] There will be no bright-line test whereby to judge whether spending limits are sufficiently generous to withstand First Amendment scrutiny any more than there is such a test to judge whether contribution limits are too low. *See Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000). But as with contribution limits, courts will be able to parse the facts and context of particular expenditure ceilings and, without second-guessing the line-drawing of the legislature, recognize differences in kind between spending limits that afford ample opportunity for all candidates to engage in vigorous discussion of their positions and those that do not. *See Buckley*, 424 U.S. at 30; *see also Nixon*, 528 U.S. at 395.

would combat both the appearance and reality of corruption without materially burdening a contributor's First Amendment rights. 424 U.S. at 20-38. The Court equated expenditures with political speech, however, and found that "the Act's expenditure ceilings impose[d] direct and substantial restraints" on First Amendment rights. *Id.* at 19-20, 39. It then ruled that three proffered state interests—in diminishing "the danger of candidate dependence on large contributions," "equalizing the financial resources of candidates competing for federal office," and "reducing the allegedly skyrocketing costs of political campaigns,"—could not justify imposing those restraints. *Id.* at 55-57. The very low limits in FECA invited such an analysis.

FECA imposed tight limits on independent expenditures, self-funding by individual candidates, and on spending by candidates' campaign committees.[4] No person could spend more than $1,000 annually advocating the election or defeat of any one federal candidate, *id.* at 40; presidential and vice-presidential candidates could spend no more than $50,000 of their own money, *id.* at 51; and varying limits were set for spending by congressional and presidential candidate committees, *id.* at 51, 54, 55. The Court commented that the independent expenditure limitation "would make it a federal criminal offense for a person or association to place a single one-quarter page advertisement 'relative to a clearly identified candidate' in a major metropolitan newspaper." *Id.* at 40. In addition, the campaign spending ceilings would have "substantially limited the overall expenditures of the two major-party Presidential candidates in 1972." *Id.* at 55 n. 62. The low levels of the limits plainly, and rightly, fueled

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[4] FECA's limits on expenditures by political parties were challenged only as Fifth Amendment violations and were upheld in *Buckley*. 424 U.S. at 59 n. 67. This Court later held that limits on independent expenditures by political parties violated the First Amendment. *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 616-618 (1996).

the Court's conclusion that First Amendment rights were severely burdened by FECA.[5] As is explained in Point II, however, generous expenditure limits need not impose such onerous burdens and thus should not be precluded by the decision in *Buckley*.

B. *Buckley* Did Not Consider the Full Range of State Interests That Could Be Proffered To Justify Generous Expenditure Caps.

The *Buckley* Court considered, and rejected, three governmental interests offered in defense of FECA's low spending limits. Although that reasoning may well warrant reconsideration, this Court need not now revisit that aspect of the decision to uphold generous spending limits. Experience since *Buckley* demonstrates that there are additional compelling state interests that may justify such limits.

What *Buckley* inadvertently wrought by upholding contribution limits and invalidating expenditure ceilings is a campaign finance system with limited supply and unlimited demand for money.[6] Candidates fearful of being outspent must chase every potential donation, even if it means—and it does mean—being locked up in a room for long hours every

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[5] *Amici* have no quarrel with the narrow holding of *Buckley* striking down the expenditure limits actually before that Court as undue interferences with political speech. It is because *Amici* believe that the size and contextual justification for a given set of spending limits are relevant to the First Amendment analysis that *Amici* oppose a mechanical reading of *Buckley* as a *per se* bar on expenditure limits, no matter what the circumstances.

[6] The solution to this problem cannot be a return to the unregulated campaign finance system with its attendant corruption, real and perceived, which precipitated the enactment of FECA in the first place. Rather, this Court should recognize that the very interests that support contribution limits, and other interests not considered in *Buckley*, warrant limits on the demand for cash as well as the supply.

day dialing for dollars. Sitting officials running for re-election are diverted from governmental responsibilities, and all candidates must divert their attention from the broad array of voters who crave communication with aspiring officeholders to the narrow range of well-heeled donors who can pay for such access. Fundraising pressures inescapable in the absence of expenditure caps thus have a direct adverse impact on the functioning of government, as both courts below recognized. *Landell v. Sorrell*, 382 F.3d 91, 123 (2d Cir. 2004); *id.*, 118 F. Supp. 2d 459, 468 (D. Vt. 2000). Moreover, the reality and appearance of corruption that arise when candidate time is disproportionately devoted to courting monied interests, *see* Elizabeth Drew, *The Corruption of American Politics: What Went Wrong and Why* 61-80 (1999) (describing what happens when the "culture of money" dominates politics); Martin Schram, *Speaking Freely: Former Members of Congress Talk About Money in Politics* 16-23, 27-35, 61-68, 89-109 (1995) (providing examples from former officeholders of how fundraising compromised legislative decisions); contribute to the "eroding of public confidence in the electoral process." *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 208 (1982).

Expenditure limits thus serve two compelling interests not considered as potential justifications in *Buckley*. First, the ceilings ensure that public officials running for office will need less time to raise campaign funds and have more time to fulfill their duties of office, improving the quality of democratic representation. Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281, 1282-83 (1994). Second, during the time that is spent on campaigning, candidates can reach out to constituents without the means to become contributors as well as to those who will provide financial support, encouraging more robust dialogue, broadening the scope of the policy debate, and building confidence in the

political process. Burt Neuborne, *Is Money Different?*, 77 TEX. L. REV. 1609, 1619 (1999) ("Fund-raising becomes such a preoccupation that it drives out competing uses of time, like thinking about issues, developing positions, and conferring with constituents even if they do not have a great deal of money.").

Finally, *Buckley* considered the constitutionality of limits imposed in FECA, which applied only to spending in federal elections. Because federal judges are not elected, the Court was never asked to consider—and this Court has never considered—whether there might be compelling governmental interests not implicated in races for executive or legislative office that could justify spending limits in campaigns for the state bench. Because Vermont does not elect its judges, that question is not presented in this case either. The distinct function of the judiciary—both federal and state, whether appointed or elected—and the unquestionable importance of preserving real and perceived judicial integrity, impartiality, and independence, thus argue for a reading of *Buckley* that does not preclude the possibility of proving compelling interests that justify expenditure ceilings in judicial elections. *See* Erwin Chemerinsky, *Preserving an Independent Judiciary: The Need for Contribution and Expenditure Limits in Judicial Elections*, 74 CHI.-KENT L. REV. 133, 135 (1998) ("*Buckley*'s rejection of expenditure restrictions for presidential and congressional elections is distinguishable because of the unique nature of the judicial role and the importance of judicial independence.").

II. *Buckley* Should Be Reconsidered If It Imposes a Ban on Mandatory Spending Limits That Reaches Not Only Executive and Legislative Races But Also Campaigns for the Bench.

If this Court reads *Buckley* as adopting an absolute ban on mandatory expenditure limits, the Court should revisit the decision in light of the factual evidence and legal arguments supporting Vermont's spending ceilings. *Cf. Agostini v. Felton*, 521 U.S. 203, 235-38 (1997). Whatever the strength of the Court's reasoning under the facts stipulated in *Buckley*, the circumstances of this case are distinguishable on at least two important grounds. First, the lower courts in this case found that effective campaigns could be conducted under Vermont's spending limits. Second, nearly 30 years of experience under *Buckley* has revealed that contribution limits alone cannot adequately combat the decline in public confidence caused by real and apparent governmental corruption. In other words, the principal assumptions on which the opinion rests do not hold true for generous spending limits that allow for meaningful campaigns.

A generous campaign spending cap is distinguishable from an unreasonably low spending limit in ways that are constitutionally significant with respect to the burden on both the candidate's First Amendment interest and the compelling nature of the government's interest in combating corruption. Given the extremely low spending limits at issue in *Buckley*, the Court correctly concluded that "the expenditure limitations contained in [FECA] represent[ed] substantial rather than merely theoretical restraints on the quantity and diversity of political speech." 424 U.S. at 19. But the generalized premise that restrictions on campaign expenditures are the equivalent of a direct ban on political speech simply does not hold when one considers the decreasing marginal effectiveness of campaign spending at generous levels. Moreover, the Court's assumptions that

campaign expenditures above a generous ceiling are unrelated to corruption and represent wholly voluntary speech are undermined by recognizing that campaign spending is often a prisoner's dilemma in which candidates feel compelled to engage in a destructive and potentially corrupting fundraising arms race. In judicial elections, especially, there is reason to believe that record-breaking expenditures are less a reflection of candidates' preferred method of conducting campaigns than of their inability (caused by the unnecessarily broad reading of *Buckley*) effectively to coordinate their decisions about spending in the absence of legally binding limits.

A. The Link Between Money and Speech Weakens as Campaign Expenditures Rise Above a Generous Level.

In striking down campaign spending limits, the *Buckley* Court's analysis rested in part on the assumption that a campaign's expenditure of money and its political speech are so closely related that an effort to regulate campaign spending is the virtual equivalent of an effort to regulate the speech directly. The Court assumed that the relationship between spending and speech is always identical, no matter how much money is involved: "A restriction on the amount of money a person or group can spend on political communication during a campaign *necessarily* reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.* at 19 (emphasis added).

In fact, the relationship between money and speech in political campaigns is not constant. Candidates spend money in order to persuade the electorate to go to the polls and vote

for them on election day.[7] To achieve that goal, candidates in contested elections must advertise themselves to the voters. Advertising, however, is subject to the law of diminishing returns—"the more of it is done, the less effective each unit becomes." Ross D. Petty, *The Impact of Advertising Law on Business and Public Policy* 38 (1992) (discussing commercial advertising); *see also* Robert W. McAuliffe, *Advertising, Competition, and Public Policy* 26 (1987) ("Most research has shown that there are *diminishing* returns to [commercial] advertising.") (emphasis in original). Although other factors also influence the marginal effectiveness of each additional dollar a candidate spends—for example, the candidate's name recognition,[8] whether the candidate is an incumbent,[9] and the amount of money her opponent has spent[10]—over a threshold level, the marginal effectiveness of additional campaign expenditures declines. *See* King Banaian & William A. Luksetich, *Campaign Spending in Congressional Elections*, 29 ECON. INQUIRY 92, 93 (1991) (noting that "additional [campaign] expenditures are not likely to be as effective as previous expenditures") (citing Gary Jacobson & Samuel Kernell, *Strategy and Choice in Congressional Elections* (1982)); Kevin B. Grier,

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[7] To the extent that a candidate's speech is a manifestation of her autonomy and self-expression, a campaign spending limit does not affect this interest. A campaign spending cap leaves a candidate free to speak her mind.

[8] *See, e.g.*, Kevin B. Grier, *Campaign Spending and Senate Elections, 1978-84*, 63 PUB. CHOICE 201, 210-11 (1989) (candidate spending to buy name recognition has a relatively larger effect at low expenditure levels as compared with the spending of a candidate that is already well known).

[9] *See id.* at 209 ("[A]t lower spending levels, challenger spending is more effective than equal amounts of incumbent spending, while incumbent spending is productive longer than is challenger spending.").

[10] *See, e.g.*, Keith T. Poole et al., *The Revealed Preferences of Political Action Committees*, 77 AM. ECON. REV. 298, 298-99 (1987) ("At the margin, a dollar of spending is more 'productive' in a close race than in one that is not highly competitive.").

Campaign Spending and Senate Elections, 1978-84, 63 PUB. CHOICE 201, 216 (1989) (stating that, while the relative productivity of campaign spending by challengers and incumbents varies with respect to the level of expenditures, "both types of spending have diminishing returns"). Thus, contrary to the *Buckley* Court's unqualified equation of campaign expenditures with political speech, the qualitative nature of the First Amendment interest of the candidate and the electorate marginally diminishes with each additional expenditure over a generous ceiling for both incumbents and challengers.[11]

In arguing that a generous spending cap would have less impact on First Amendment rights than would a low expenditure ceiling, *Amici* do not suggest that the impact is *de minimis*. Campaign expenditures above a generous spending cap would enable candidates to issue more campaign advertisements, just as allowing contributors to give more than $2,000 to a candidate for federal office would enable a contributor to communicate more strongly the intensity of her support for a candidate. The point is instead that just as the First Amendment value of money contributed to candidates decreases over a threshold amount, *see Buckley*, 424 U.S. at 20, the First Amendment value of money spent by candidates decreases at the high end of a diminishing

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[11] It is sometimes argued that spending ceilings have a greater impact on challengers than incumbents, largely because challengers must spend more to overcome the incumbency advantage of high name recognition. *See, e.g.*, Gary Jacobson, *The Effects of Campaign Spending on Congressional Elections*, 72 AM. POL. SCI. REV. 469, 470 (1978). Although this claim is hotly contested in the political science literature, *see, e.g.*, Donald Green & Jonathan Krasno, *Rebuttal to Jacobson's "New Evidence for Old Arguments,"* 34 AM. J. OF POL. SCI. 363, 369-72 (1990) (arguing that other factors, such as challenger quality, determine spending patterns and votes received), the argument is not directly pertinent in this case, as the spending ceilings in Vermont are generous and are not likely to stifle challenger spending.

marginal impact curve. As that value declines, so should the burden imposed on a state seeking to justify spending limits.

B. Spiraling Expenditures May Reflect a Prisoner's Dilemma, Rather Than Fully Voluntary Spending in Need of Protection.

The *Buckley* Court's decision to invalidate FECA's campaign expenditure limits rested on two key premises. The Court assumed that: (1) candidates were each free to choose whether to raise and spend increasingly large sums on their election campaigns, and (2) the level of expenditures was unconnected to the threat of corruption. *See* 424 U.S. at 57 ("[C]andidates . . . must retain control over the quantity and range of debate on public issues in a political campaign."); *id.* at 55-56 (campaign spending limits do not address the threat of corruption stemming from candidate dependence on large contributions). When applied to elections with high levels of campaign spending, however, neither assumption is justified.

Candidates functioning in an unregulated campaign expenditure setting are trapped in a prisoner's dilemma. In the classic account of the prisoner's dilemma, two prisoners are arrested and held separately with no means of communication. If neither cooperates with the prosecutor, both will be convicted of a lesser offense and sentenced to two years' imprisonment; if only one agrees to testify against the other, that one will go free and the other prisoner will receive the maximum sentence of ten years' imprisonment; and if both cooperate, each will be prosecuted for the more serious crime but receive a six-year sentence instead of the maximum penalty. The prisoner's dilemma produces independent decisions by both prisoners to cooperate with the prosecutor, leaving them worse off than if they had been able to coordinate their decisions and agree to keep silent. Each prisoner would reason that he will be better off confessing

whether his codefendant stays silent (in which case he will receive no prison time instead of two years) or also confesses (in which case he will receive six years in prison instead of ten). *See* Douglas G. Baird et al., *Game Theory and the Law* 33-34 (1994); William Poundstone, *Prisoner's Dilemma* 116-25 (1992); Russell Hardin, *Collective Action* 2-3 (1982).

In the candidate's version of the prisoner's dilemma, each candidate must continue to raise and spend funds, not because he or she would freely choose to do so, but because the candidate fears that an opponent will do so, and thereby gain an advantage. "Each [politician] would prefer expenditures to be limited, but if they are not limited, each must struggle to raise and spend as much as possible." Ronald Dworkin, *Free Speech and the Dimensions of Democracy, in If* Buckley *Fell: A First Amendment Blueprint for Regulating Money in Politics* 63, 83 (E. Joshua Rosenkranz, ed. 1999). The resulting uncontrollable spiral intensifies candidates' dependence on contributions, rendering them vulnerable to the appearance and reality of corruption. The effect of the candidate's dilemma is that candidates and society are both worse off than if a generous spending ceiling had been in effect.

Except for the very wealthy, or in a system of full public funding of elections, all candidates must raise money to run for office. An unending round of fundraising is not always in the best interests of candidates. It is inordinately time-consuming, it is personally demeaning, it deflects them from the substantive business of governance and campaigning, and it exposes them to the reality and appearance of corruption. Moreover, because campaign spending follows the law of diminishing returns, at extremely high levels, it is unlikely to change the outcome of the election at all, especially when matched by an opponent. For these reasons, a rational candidate would seek to engage in no more fundraising than is necessary to make a persuasive case to the electorate.

Acting alone, however, no candidate can set a reasonable campaign spending (and therefore fundraising) limit. Campaign spending is not a static event. *See generally* Steven Ansolabehere & Shanto Iyengar, *Winning Through Advertising: It's All in the Context, in Campaigns and Elections American Style* 101, 108-11 (James A. Thurber & Candice J. Nelson eds., 1995) (noting that the impact of one candidate's advertising is contingent on the opponent's advertising; political advertisers are interdependent rather than autonomous actors). Although the law of diminishing returns applies to campaign expenditures, each candidate knows that winners usually outspend losers. *See, e.g.*, Poole, *supra* note 9, at 298; Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160, 1175 (1994).

Accordingly, to set a reasonable budget, each candidate needs to know how much money his opponent will spend on the race. In an unregulated campaign expenditure world, however, a candidate will never know the outer range of his opponent's budget. A rational candidate therefore will engage in limitless fundraising and spending, reasoning that she is better off doing so no matter what her opponents does: she avoids the danger that she will be outspent and suffer because outspending correlates with winning, and given this correlation she may gain advantage by outspending her opponent. The result of this candidate's dilemma is a fundraising spiral in which, after a threshold level, each side engages in fundraising primarily out of fear that the other side will gain an advantage. *See* Neuborne, *Is Money Different?*, 77 TEX. L. REV. at 1617.

Moreover, as campaign spending spirals to higher and higher levels, candidates become more vulnerable to corruption. Because *Buckley* considered candidate

dependence on "large contributions" as the sole source of the actuality and appearance of political corruption, 424 U.S. at 55, the Court failed to consider that spiraling campaign costs are also corrupting because they increase a candidate's dependence on contributions *generally*. In the post-*Buckley* world, candidates are desperate to maximize expenditures, but limited in the amount of contributions they can raise from any one donor.[12] Hence, candidates must sell themselves to greater numbers of donors for smaller amounts of money. In such an atmosphere of intense need, both candidates and contributors are intensely vulnerable to an inappropriate temptation to trade badly needed cash for badly needed political favors. In contrast, under a spending cap, contributors become more fungible. If one contributor expects something in return for his contribution, the candidate can move to another who will not make such demands, without significant risk of strategic loss.

The involuntary and mutually destructive nature of the candidate's dilemma is well documented by the 2004 Supreme Court election in Illinois. The election set a national fundraising record for a single state Supreme Court seat—with the two candidates raising more than $9.3 million. Deborah Goldberg, *et al.*, *The New Politics of Judicial Elections 2004: How Special Interest Pressure on Our Courts Has Reached a "Tipping Point"—and How to Keep Our Courts Fair and Impartial* 14, 18 (Justice at Stake 2005). But even the victorious candidate expressed dismay at a campaign finance system that produced an endless money chase. Calling the expenditures "obscene," winner Lloyd Karmeier asked: "What does it gain people? How can people

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[12] Candidates are desperate to maximize expenditures even in states without contribution limits, as the recent Supreme Court elections in Illinois (described *infra*) demonstrate. There, the potential for corruption created by the endless demand is exacerbated by the opportunities for corruption presented by large contributions.

have faith in the system?" Ryan Keith, *Spending for Supreme Court Renews Cry for Finance Reform*, Associated Press (AP Wire), Nov. 3, 2004. Plainly, the new justice did not believe that he or his opponent needed to spend many millions of dollars to deliver their messages to the electorate, but the system left neither of them with any other choice.[13]

Without that choice, Karmeier accepted large sums directly and indirectly from a party with a case pending before the Illinois Supreme Court while the election proceeded. Kevin McDermott, *Donations to Judge Figure in Court Cases*, St. Louis Post-Dispatch (Feb. 1, 2005). Once elected, he refused to recuse himself from the case. *See* Kevin McDermott, *Court Says Karmeier Can Hear Donor's Case*, St. Louis Post-Dispatch (Mar. 16, 2005). He then cast the deciding vote on a $456 million claim, overturning a lower court decision that was unfavorable to his donor. *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801 (Ill. 2005); G.M. Filisko, *Billion-Dollar Verdict Goes Bust: Illinois Supreme Court Reverses Record Verdict Against State Farm*, ABA Journal e-Report (Aug. 26, 2005), *at* http://www.abanet.org/journal/ereport/au26verdict.html.

Even assuming that the decision was based on an unbiased consideration of the facts and the law, public confidence in the judge's integrity has been tarnished. *See, e.g.*, Lyle Denniston, *A Constitutional Duty to Recuse?*, *at* http://scotusblog.com/movabletype/archives/2005/12/25 week/ ("Should an elected judge, who accepts large

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[13] Contributors to Karmeier also recognized the structural problem. "This is a system that has just gotten out of control," said Ed Murnane of the Illinois Civil Justice League, an association of doctors, insurers, and business groups, which was a major donor to Karmeier's campaign. Ryan Keith, *Spending for Supreme Court Renews Cry for Finance Reform*, Associated Press (AP Wire), Nov. 3, 2004 (noting that Murnane "agreed with Karmeier and others that limits on spending in judicial races or other ways to elect or appoint judges should be considered").

campaign donations, sit on a case that directly affects the financial or business interests of the donors and their associates? Put as an ethical question, the answer would seem to be obvious: No."); *Justice for Sale*, *at* http://www.acrsnetwork.com/acrs/html/justice_for_sale.html (noting that post-decision interviews revealed "overall lack of faith in the judicial system, the uniform belief that justice had been sold to the entity capable of paying the most"). In a system with expenditure limits, the candidates would not face the untenable choice between rejecting contributions that compromise their perceived impartiality and losing the advantage that comes with tainted cash.

The harms caused by the candidate's dilemma can be dealt with only by collective action that promises each side that the other will not gain a competitive advantage—in other words, by adhering to a generous spending cap imposed by law. Under such a cap, neither side will be driven to raise funds out of fear of the other's excesses.

Voluntary spending limits cannot achieve this goal. The transaction costs of trying to reach an agreement on spending are too high in races involving more than two candidates, and the strategic reasons that cause candidates to engage in the fundraising race to begin with will dissuade any candidate from agreeing to limit spending if she believes she is the better fundraiser. Even if candidates were able to agree to spending limits, the distrust between them and the temptation

to outspend each other will make such agreements highly unstable.[14]

In Ohio, the state Supreme Court's effort to end the candidate's dilemma by limiting expenditures was defeated by the overly broad reading of *Buckley* recommended by Petitioners in the instant case. *Suster v. Marshall*, 149 F.3d 523 (6th Cir. 1999). The *Suster* court concluded that "the language of *Buckley* and its progeny have necessarily determined, irrespective of the *kind* of position sought, that any spending restriction in any *electoral* campaign process is an infringement on a candidate's First Amendment rights." *Id.* at 530 (emphasis in original). Claiming that *Buckley* recognized only one compelling state interest, the *Suster* court refused even to consider others that might justify spending limits in judicial campaigns. *Id.* at 532 ("Although Defendants cite several other interests, the prevention of corruption is the only interest the Supreme Court has and, hence, this Court will give credence."). When the limits were invalidated, several candidates nevertheless made serious efforts to control their spending, producing average expenditures in the general election of approximately $800,000. Institute on Money in State Politics, State at a Glance: Ohio 2000, Judicial Elections, http://www.followthemoney.org/database/StateGlance/state_judicial_elections.phtml?si=200035. But fundraising pressures were overwhelming as soon as the next cycle, and average general election spending nearly doubled to $1.56 million in 2002.

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[14] That voluntary spending limits cannot by themselves resolve the candidate's dilemma is evident in the record below, where the District Court noted that adherence to the voluntary limits Vermont adopted in 1993 "plummeted" with "each election cycle," until no candidates agreed to participate in 1998. *Landell*, 118 F. Supp. at 465; *see also* Frank Phillips, *Kerry Spent $1.7m on Election*, Boston Globe, Dec. 6, 1996 (noting the breakdown of an agreement to limit use of personal funds following Senator Kerry's allegation that Governor Weld had violated their spending agreement for the 1996 senatorial race).

Deborah Goldberg, *et al.*, *The New Politics of Judicial Elections 2002: How the Threat to Fair and Impartial Courts Spread to More States in 2002,* 19 (Justice at Stake 2004).[15] *Amici* reflect the concerns of many judges who would welcome a solution to the candidate's dilemma.

C. This Court Should Not Reach Out to Preclude States from Combating the Harms Associated with Uncontrolled Judicial Campaign Spending.

Amici have argued that if *Buckley* is read to impose a per se ban on spending limits, its key assumptions should be reexamined in this case. Because the interest in completely unfettered campaign spending decreases as expenditures cross very high thresholds, the burden of spending limits set at generous levels is not severe. Indeed, spending limits ample enough to ensure robust debate may more appropriately be regarded not as a burden, but as relief from unwelcome and relentless pressure to raise endless amounts of campaign cash. Finally, *Amici* have challenged *Buckley*'s assumption that contribution limits are adequate to guard against real and perceived corruption by describing the corrupting potential of the uncontrolled demand for every possible lawful donation. *Supra*, at 16.

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[15] The record-breaking spending in Illinois might be attributed in part to the absence of contribution limits in that state. But Ohio, which imposed $2,200 limits on contributions to 2002 candidates for the Supreme Court, Edward D. Feigenbaum & James A. Palmer, *Campaign Finance Law 2002* OH-3 (FEC), *available at* http://www.fec.gov/pubrec/cfl/cfl02/cfl02part2bsummaries.doc, saw four million-dollar campaigns in that year. Contribution limits are not designed to control spending, and they often do not do so in practice. *See* Kedron Bardwell, *Campaign Finance Laws and the Competition for Spending in Gubernatorial Elections*, 84 SOC. SCI. Q. 811 (Dec. 2003). Only the coordination mechanism supplied by expenditure caps can end the candidate's dilemma in judicial elections.

Even if this Court rejects *Amici*'s critique of *Buckley*, restraint should be exercised to ensure that the opinion in this case does not unnecessarily reach beyond the circumstances presented here. The state's interest in protecting the real and perceived integrity of candidates who are desperate for campaign cash under any system that does not limit spending does not vary depending on whether they are running for executive, legislative, or judicial office. But there are functions unique to the judiciary—its role as impartial arbiter of disputes and as an independent check on majoritarian excesses—that states have strong interests in defending and that should not be foreclosed by an unnecessarily broad decision in this case.

Whether the interests in actual and apparent judicial impartiality and independence are sufficiently compelling to justify mandatory spending limits in campaigns for the bench should await a case that squarely presents that question. To the extent that *Buckley* is read to reach that question, even though it was not presented on the facts of that case, this Court should overrule *Buckley*. States should be free to demonstrate that interests uniquely implicated by judicial campaign finance are sufficiently important to justify limits on spending in campaigns for the bench.

That option should remain open even though the harms associated with uncontrolled candidate spending could be eliminated by ending judicial elections altogether. After all, even appointment systems are not immune from the influence of money and politics—witness the battle waged on the air and the web over the three most recent U.S. Supreme Court nominations. *See, e.g., Advice, Consent, and Advertising: Television Advertising on Nominations to the U.S. Supreme Court, at* http://www.brennancenter.org/programs/scnominations/robertsnomination.html; *Withdraw Harriet Miers, at* http://withdrawharrietmiers.blogspot.com/. States originally adopted judicial elections as a means of protecting the

judiciary from the ills of patronage and partisan politics, Kermit Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846-1860,* 45 HISTORIAN 337 (1983), and they have introduced a variety of structural changes to the electoral process in response to developments that threatened unduly to politicize the judiciary, *see* L. Berkson, *Judicial Selection in the United States, in Guide to Political Campaigns in America* 398 (P. Herrnson, ed.2005) (describing rise of nonpartisan elections); *see also Republican Party of Minn. v. White*, 536 U.S. 765, 791 (2002) (O'Connor, J., concurring) (describing "Missouri Plan," which couples appointment with retention elections). States should now be free directly to address the most recent threat—the rising importance of money in judicial elections—through changes in their campaign finance systems, including spending limits. Precluding states from adopting such changes will not necessarily ensure the abandonment of judicial elections, but it will certainly hasten the decline of the real and perceived integrity, impartiality, and independence of the judiciary. Because Vermont's law is not applicable to judges, this Court can and should decide this case without foreclosing spending limits in judicial elections.

CONCLUSION

Amici take no position on the constitutionality of the specific spending limits at issue in these consolidated cases. For the reasons stated above, however, *Amici* respectfully request that the Court affirm the decision below as to its holding that mandatory spending limits are not unconstitutional *per se*. If the lower court's holding is rejected as to spending limits in executive and legislative races, *Amici* urge the Court to craft its decision not to foreclose the imposition of spending limits in judicial elections.

Respectfully submitted,

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February 8, 2006

APPENDIX

APPENDIX

LIST OF *AMICI CURIAE*

Former Chief Justices of state high courts:

- Hon. James G. Exum, Jr. (North Carolina Supreme Court, 1986-1994)
- Hon. Richard P. Guy (Washington Supreme Court, 1999-2001)
- Hon. William C. Hastings (Nebraska Supreme Court, 1987-1995)
- Hon. Vincent L. McKusick (Maine Supreme Judicial Court 1977-1992)
- Hon. Robert A. Miller (South Dakota Supreme Court, 1990-2001)

Former and current Associate Justices and Associate Judges of state high courts:

- Hon. Andy Douglas (Ohio Supreme Court, 1985-2002)
- Hon. Robert H. Dudley (Arkansas Supreme Court, 1981-1996)
- Hon. Stewart F. Hancock, Jr. (New York Court of Appeals, 1986-1993)
- Hon. Howard A. Levine (New York Court of Appeals, 1993-2002)
- Hon. Alice Resnick (Ohio Supreme Court, 1989-present),
- Hon. Cruz Reynoso (California Supreme Court, 1982-1987)

Former and current Justices and Judges of intermediate appellate and trial courts:

- Hon. Murry Cohen (Court of Appeals for the First District of Texas, 1983-2002)
- Hon. Donald J. Horowitz (Superior Court of Washington for King County, 1973-1977)